FKW, Incorporated *and* International Brotherhood of Electrical Workers, AFL–CIO, Local Union 1141. Case 17–CA–15959

July 12, 1994

DECISION AND ORDER

BY MEMBERS STEPHENS, DEVANEY, AND COHEN

On March 2, 1993, Administrative Law Judge Steven M. Charno issued the attached decision. The Charging Party filed exceptions and a supporting brief, and the Respondent submitted an answering brief to the exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In adopting the judge's finding that the Respondent did not, as alleged, unlawfully refuse to bargain with the Union, Member Devaney notes that, while he dissented in *FKW, Inc.*, 308 NLRB 598 (1992), he accepts as the law of this case the Board majority's decision there to assert jurisdiction over the Respondent.

Stephen E. Wamser, Esq., for the General Counsel.
W. Davidson Pardue Jr., Esq. and *Charles W. Ellis, Esq. (Lawrence & Ellis, P.A.)*, of Oklahoma City, Oklahoma, for the Respondent.

DECISION

STEVEN M. CHARNO, Administrative Law Judge. In response to a charge timely filed by the International Brotherhood of Electrical Workers, AFL–CIO, Local Union 1141 (Union), a complaint was issued on June 19, 1992, which alleged that FKW, Incorporated (Respondent) violated the National Labor Relations Act (the Act) by refusing to bargain collectively with the Union. Respondent's answer and amended answer denied the commission of any unfair labor practice.

A hearing was held before me in Midwest City, Oklahoma, on October 27, 1992. Briefs were thereafter filed by the parties under due date of December 1, 1992.

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation engaged in providing maintenance services for Federal agencies with an office and place of business in Oklahoma City, Oklahoma. During the 12-month period ending May 31, 1992, Respondent, in the course of its operations, performed services valued in excess of $50,000 in States other than Oklahoma. It is admitted, and I find that, Respondent is an employer engaged in commerce within the meaning of the Act.

The Union is admitted to be, and I find is, a labor organization within the meaning of the Act.

II. ALLEGED UNFAIR LABOR PRACTICE[1]

A. *Background*

Since 1986, Respondent has provided maintenance and repair services at the Mike Moroney Aeronautical Center (Center) under contracts administered by the Federal Aviation Administration (FAA). In 1990, the Union filed a representation petition with the Board seeking an election in Case 17–RC–10512. Respondent and the Union entered a Stipulated Election Agreement, an election was held, the Union received a majority of the votes cast and, on July 5, 1990, the Union was certified as the collective-bargaining representative of the electricians employed by Respondent at the Center.[2]

B. *The Negotiations*

Around mid-October 1990, Travis L. Brown, Respondent's project manager, and Bill Motley, the Union's business manager, commenced collective-bargaining negotiations. In March 1991,[3] International Representative Ray Hill joined the negotiations on behalf of the Union, and Respondent's attorney, Charles Ellis, began taking part in June. Working from a common draft, the parties reached tentative agreement in June on a number of noneconomic provisions, including article II, section 5 which stated:

> It is acknowledged and agreed by the parties hereto that the Company has a contract with the Federal Aviation Administration and that particular contract (and any ap-

[1] Except as indicated, the facts set forth below are not in dispute.

[2] The unit in which the Union was certified is as follows:

> All full time and regular part-time master electricians, industrial electricians and electrician helpers employed by Respondent at the Mike Moroney Aeronautical Center, Oklahoma City, Oklahoma, But EXCLUDING, all other employees including Q.A. specialists, master industrial HVAC, journeymen HVAC, helper HVAC, boiler mechanics/pipefitters, mill wrights and helpers, journeymen carpenters, master plumbers and helpers, painters and helpers, elevator mechanics and helpers, fire suppression technicians, pest control technicians, laborers, maintenance trade helpers, water treatment specialists, electronics technicians, CCMS team leader, CCMS operators, CCMS surveillance employees, warehouse team leader, computer programmer/analyst, computer hardware technician, O&M electromechanical technicians, equipment mechanics, preventative maintenance employees, telecommunications manager, office clerical employees, guards and supervisors, as defined in the Act.

[3] All dates hereinafter are 1991, unless otherwise indicated.

> plicable laws) for its term or any extensions thereof, during the term of this Agreement, shall control any and all provisions of this Agreement.

Although six or seven noneconomic issues were still unresolved at this time, the parties turned their attention to the economic issues.

On July 29, Respondent made a wage and benefit offer to the Union with the explanation that the offer contained the same wages and benefits as those in Respondent's pending bid for an FAA contract. That offer represented a decrease in the wages and benefits then being received by Respondent's employees at the Center. At this and subsequent sessions, the Union requested a copy of Respondent's bid to the FAA. Respondent consistently declined to produce the document on the ground that the contract had not yet been awarded and the bid contained proprietary information.

On September 10, the parties agreed to suspend negotiations until an FAA contract was awarded. They further agreed that (1) Respondent would notify the Union within 24 hours of the award, (2) Respondent would make available bid information in order to establish that Respondent's offer was consistent with the wages and benefits set forth in its bid to the FAA,[4] (3) the Union would have 7 days to examine the information,[5] and (4) the parties would thereafter engage in ''marathon bargaining'' in order to reach an agreement.[6]

Brown received notice that Respondent had been awarded the FAA contract at 4 p.m. on December 6. He immediately informed a member of the Union's bargaining committee of the award and asked that individual to inform Motley. Brown also sent Motley a letter by certified mail, which Motley signed for on December 9. Motley did not open the letter but left with Hill for a seminar in Dallas. On December 11, Ellis wrote to Motley iterating the agreements reached on September 10 and urging haste in meeting since the FAA contract was due to be implemented on January 1, 1992. Motley returned from Dallas on December 13 and, the following day, wrote Ellis to agree to a negotiating session on December 16.

On December 16, Motley and his bargaining committee (with the exception of Hill) met with Respondent's representatives. The latter supplied 12 pages of bid information concerning the wages and benefits of electricians at the Center, and Motley requested (1) the wages of other employees working for Respondent at the Center; (2) Respondent's policy concerning merit wages increases; and (3) Respondent's award and bonus fees, i.e., Respondent's profit, under the contract. Respondent made a verbal proposal on sick leave and jury duty, and the parties agreed to meet on December 20. Later that day, Respondent sent the Union a facsimile which set forth the wages paid other employees at the Center.

At the December 20 meeting, Hill requested job descriptions, merit increase procedures, profit information, Respondent's accounting statement on the FAA contract, and Respondent's corporate profit-and-loss statement. Respondent requested additional negotiating sessions on December 21, 23, and 24, but Hill ruled out any meetings before January 6, 1992, in view of the impending holidays and Motley's vacation plans. The session ended without agreement on a date for further negotiations. Later that day, Ellis wrote Hill supplying the requested job descriptions, noting that the merit increase information had been supplied on December 16 and again refusing to supply profit or financial information since Respondent had never asserted a financial inability to pay the wages or benefits proposed by the Union.[7]

On December 30, Respondent announced implementation of its December 16 wage and benefit offer to the Union. That offer did, in fact, incorporate the wages and benefits set forth in the FAA contract.

The parties met again on January 24, 1992, when the Union made a new economic proposal and an agreement was reached on jury duty and leaves of absence. The parties then agreed to suspend further negotiations until the unfair labor practice charge which is the subject of this proceeding was resolved.

On June 19, 1992, the Union filed a petition with the Board in Case 17–RC–10798 to allow it to represent all full-time and regular part-time operation and maintenance employees (excluding the electricians) employed at the Center by Respondent pursuant to the FAA contract.[8] The Regional Director's decision asserting jurisdiction over Respondent in that proceeding was adopted by the Board on August 31, 1992, in *FKW, Inc*., 308 NLRB 598 (1992).

C. *Discussion*

The FAA is not an ''employer'' within the meaning of the Act, 29 U.S.C. § 152(2), and is, therefore, exempt from the Board's jurisdiction. It is the Board's policy to refuse to exercise jurisdiction over an employer whose contractual relationship with an exempt entity precludes meaningful bargaining with a labor organization. See *Res-Care, Inc*., 280 NLRB 670 (1986). Based on this policy, Respondent contends that the Board should decline to exercise jurisdiction in this case. This issue is resolved by the finding made by the Regional Director and adopted by the Board in *FKW, Inc*., supra,

[4] Brown so testified, while Hill stated that Respondent had agreed to provide the entire bid. Brown's account is consistent with Respondent's documented position throughout the entire negotiations and is supported by Ellis' December 11 letter to Motley which chronicled Respondent's agreement to provide ''relevant information . . . to establish that the pending wage offer . . . were the same rates as FKW bid on the government contract.'' This chronicle was not challenged or questioned in Motley's December 14 response to Ellis. The limited purpose for which the information was to be provided is corroborated by Motley's affidavit: ''to verify their claims that they were offering wages and benefits in their proposal consistent with this bid.'' For the foregoing reasons and based on the demeanor of the witnesses while testifying, I credit Brown's account.

[5] Brown's testimony to this effect is supported by Ellis' December 11 letter to Motley.

[6] Brown so testified, while Hill denied any commitment to engage in marathon bargaining. Again, Brown's testimony was supported by Ellis' December 11 letter to Motley which recited an agreement to ''schedule a meeting and meet as long as necessary to reach a collective-bargaining agreement, if possible.'' Motley's December 14 reply to Ellis neither questioned nor controverted the recited agreement. For this reason and based on my observation of the demeanor of both witnesses while testifying, I credit Brown over Hill on this point.

[7] General Counsel does not appear to contend that defendant's refusal to supply profit or financial information was violative of the Act.

[8] Official notice was taken of the entire record in that proceeding.

which I conclude to be the ''law of the case'' regarding jurisdiction in this proceeding. See *Southern Pac. R.R. v. United States*, 168 U.S. 1, 48–49 (1897). The Board there asserted jurisdiction over Respondent because the letter was able to bargain with the Union in a meaningful manner concerning certain matters which were not controlled by the FAA contract. Specifically, the Board found that the FAA contract allowed Respondent sufficient control to permit meaningful bargaining in the following areas: (1) the discretionary awarding of incentive pay, as opposed to wage levels which were established by the FAA contract; (2) the mix of insurance benefits, as opposed to the total amount of such benefits which were set by the contract; and (3) Respondent's personnel and labor policies. Given the absence of evidence in this proceeding contravening the Board's earlier findings, I conclude that the Board has jurisdiction over Respondent in this proceeding.

The Board's Order in *FKW, Inc*., supra, also adopts findings that the FAA contract (1) ''specifies the specific wage rate to be paid employees in each classification,'' (2) ''specifies that employees receive pension benefits equal to 5% of their wages,'' and (3) ''provides for vacation, sick leave and paid holidays.'' It is precisely these wages and benefits which were the subject of Respondent's December 16 offer to the Union and which were unilaterally implemented by Respondent on January 1, 1992. That offer provided the maximum dollar amount of nonincentive wages and benefits which might be paid without violating the FAA contract.[9] In sum, I find that Respondent implemented only those terms and conditions dictated by the FAA contract and thereafter demonstrated its willingness to negotiate concerning terms and conditions not controlled by the contract. I further find that, because Respondent lacked the ability to negotiate concerning the matters prescribed by the FAA contract, its failure to do so did not constitute a refusal to bargain violative of the Act.[10] To hold otherwise would either require the Board to modify the contractual relationship between Respondent and an entity over which the Board has no jurisdiction or to unfairly require Respondent to act in violation of its contract with an exempt entity.

[9] The Center's Contracting Officer, who appeared as an expert witness on behalf of General Counsel, credibly testified that, although Respondent was theoretically free to use its profits to increase employee compensation, any such payments would be costs subject to reimbursement under the FAA contract and would therefore violate the wage provisions of the Contract.

[10] Given this holding, I find Respondent's arguments concerning waiver to be moot.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time master electricians, industrial electricians, and electrician helpers employed by Respondent at the Mike Moroney Aeronautical Center, Oklahoma City, Oklahoma, but EXCLUDING, all other employees including Q.A. specialists, master industrial HVAC, journeymen HVAC, helper HVAC, boiler mechanics/pipefitters, mill wrights and helpers, journeymen carpenters, master plumbers and helpers, painters and helpers, elevator mechanics and helpers, fire suppression technicians, pest control technicians, laborers, maintenance trade helpers, water treatment specialists, electronics technicians, CCMS team leader, CCMS operators, CCMS surveillance employees, warehouse team leader, computer programmer/analyst, computer hardware technician, O&M electromechanical technicians, equipment mechanics, preventative maintenance employees, telecommunications manager, office clerical employees, guards and supervisors, as defined in the Act, constitute a unit appropriate for bargaining within the meaning of Section 9(b) of the Act.

4. A preponderance of the evidence does not establish that Respondent violated the Act.

On these findings of fact and conclusions of law and on the entire record I issue the following recommended[11]

ORDER

The complaint issued on June 19, 1992, against FKW, Incorporated, Oklahoma City, Oklahoma, is dismissed.

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.